TUAN HJ. SARIP HAMID & ANOR.

v.

PATCO (M) BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 02-7 OF 1990]
29 NOVEMBER 1990

CIVIL PROCEDURE: *Industrial Court - Threshold and broad jurisdiction - High Court - Review vs. appellate jurisdiction - Preliminary issue - Merits - Judicial review - Important distinction between the jurisdictions.*

STATUTORY INTERPRETATION: *Resignation of director - Dues not paid - Whether regarded as dismissal - Definition of "workman" -* ***Inchcape*** *case - Industrial Relations Act 1967, s. 20(1).*

The 1st appellant, THS joined P, the respondent, as general manager in 1980 and was made a director on 23 June 1983; he also had 16.32% equity in P. In April 1986, THS decided to sell his shares to N and this sale was approved by the board of directors on the condition that THS resign from his positions as general manager and director of P. THS agreed to this condition subject to the payment of his dues by P.

By two separate letters dated 30 May 1986, THS resigned from these positions and his resignation was accepted by P; however there was a dispute as to the amount of dues claimed by THS. On 19 June 1986 THS wrote to the Chairman of P stating that if his dues were not met by 25 June 1986, he (THS) would consider himself dismissed by the company.

P raised a preliminary objection that THS was not a "workman" within the meaning of s. 20(1) of the Industrial Relations Act 1967 (the Act) and that THS had resigned from the said positions. The Industrial Court (IC) held that THS was not the brain and directing mind of P and that as general manager of P, THS came within the definition of "workman" in s. 20(3). of the Act.

On appeal, the High Court overruled the ruling of the IC and held that THS was not a workman; the High Court also went into the merits of the case and held that THS had not been dismissed on 30 May 1986 nor on 25 June 1986 and that THS had resigned voluntarily on 30 May 1986; hence this appeal.

[The IC had not decided on the questions of whether THS was dismissed on 30 May 1986 or 25 June 1986 and whether THS had resigned voluntarily on 30 May 1986 or was constructively dismissed on 25 June 1986].

Held:

[1] Under the Act, a dispute on jurisdiction can occur at two stages in proceedings before the IC - one is the initial or threshold stage and the other is the final or broad stage when it would actually go into the merits of the case.

[2] (a) The IC had merely gone into the threshold jurisdiction as to whether THS was a workman at the date when he considered himself dismissed;

(b) by going into the merits of the case, the trial Judge had converted his review jurisdiction on a matter of *certiorari* in a preliminary issue as to whether THS was a workman as defined by the Act into an appellate jurisdiction.

(c) the trial Judge was wrong to say that THS must determine the date of dismissal; the trial Judge did not appreciate the importance of the two stages and did not distinguish between the threshold and broad jurisdiction. The IC was very cautious in not stepping over the line in deciding the preliminary issue;

(d) the trial Judge decided on matters which have yet to be decided by the IC; in holding that THS had resigned voluntarily, he had departed from the judicial review of the threshold jurisdiction of the IC by going into the substantive merits of the case on the matter of the dismissal claim which was pending before the IC;

(e) The trial Judge only considered the position of director but did not touch on the position of general manager and did not deal with THS's contention that these positions were merged as THS always signed letters as director/general manager.

[3] Although the trial Judge held that if it were true that on the date THS was dismissed, THS was also not a director of P, the IC was right in holding that as general manager, THS was a workman - however, the trial Judge felt that the IC had made an error so he overruled the decision of the IC by going into the merits of the case.

[Appeal allowed.]

Award referred to:
Patco Malaysia Bhd. & Tuan Haji Sarip b. Hamid [1988] ILR Vol. 1 423 (Award 122/88)

Cases referred to:
Enesty Sdn. Bhd. v. Transport Workers Union & Anor. [1986] 1 MLJ 18
Inchcape Malaysia Holdings Bhd. v. R.B. Gray and Anor. [1985] CLJ (Rep) 132
Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ (Rep) 298

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3), 26(1), 56(1)

For the appellants - B. Lobo; M/s. Lobo & Associates
For the respondent - Ambiga Sreenivasan; M/s. Skrine & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal and stated that we would give our reasons later. We do so now.

The appeal is concerned with a preliminary ruling of the Industrial Court in its Award No. 122 of 1988.

The facts have been set out in some detail by the learned Judge. They may be stated shortly. Tuan Haji Sarip, the 1st appellant, (the claimant) joined Patco Malaysia Bhd., the respondent, (the company) in September 1980 as general manager. He was made a director on 23 June 1983 by the board of directors. He was also a shareholder of the company, having 16.32% of the equity of the company whose paid-up capital was RM15 million. In late April 1986 he contracted with Nihon Radiator Co. Ltd., Japan to sell 1.5 million of his shares in the company at RM1.05 per share. He sought the approval of the board of directors for the said sale. By a resolution on 8 May 1986 the board of directors approved the sale but subject to certain

conditions, one of which was that he resigned from his post as general manager and also as director of the company. By letter dated 16 May 1986 he conveyed to the company conditions on which he would comply with the requirement formally to relinquish his positions. At a meeting on 30 May 1986 he requested the board of directors to issue share certificates to the third party buyer of the said shares on an urgent basis. In return he wrote on the same day a letter resigning from his post as general manager and director effective three months from 30 May 1986. The board of directors decided to accept his resignation as general manager and director with immediate effect and to pay him all his dues. On 6 June 1986 the Chairman of the board of directors wrote him two letters. One was to inform him that he ceased to be director on 30 May 1986. Another was to inform him that he ceased to be the general manager on 30 May 1986 and enclosing a cheque for RM36,813 being payment of salaries, bonuses, allowances and so forth. On 19 June 1986 he wrote to the Chairman of the board of directors that the dues promised to him had not been met. Unless he got a response about the dues or reinstatement to his former position of general manager by 25 June 1986 he would consider himself dismissed by the company.

The parties stated their positions clearly as indicated by the claimant's statement of the case. (See Vol. 2 of the appeal record, pp. 30-33 and the company's amended statement of reply (see Vol. 2 of the appeal record pp. 48-50).

By para. 1 of the statement of reply the company stated that:

> This company will contend that the claimant is not a workman within the meaning of s. 20(1) of the Industrial Relations Act 1967. Further and/or in the alternative, this company will state that the claimant who was also a director resigned from his post as general manager and director of the company and was not dismissed.

This brought about the preliminary issue before the Industrial Court and subsequent appeal to the High Court. At p. 406 of Vol. 2 of the appeal record the Chairman of the Industrial Court set out the matter clearly when he said at the opening of his ruling:

> This company at the very outset of the hearing raised a preliminary objection that the claimant was not a workman within the meaning of s. 20(1) of the Industrial Relations Act 1967.

In the course of his ruling he stated:

> I am satisfied from the evidence before me and the agreement - (CO2) - between the company and the claimant that the claimant was not the very brain and directing mind of the company. In the circumstances, I rule that the claimant as general manager of the company comes within the definition of "workman" in the Industrial Relations Act 1967.

The learned Judge disagreed with this ruling. At p. 11 of his grounds of judgment he stated:

> The Chairman of the Industrial Court in his award stated that he found that the claimant's resignation from directorship of the board was effective immediately on 30 June 1986, and went to say:
>
> > The claimant ceased to be a director on 30 May 1986. Then since the company did not comply with the requirements in the last paragraph of his letter - dated 19 June 1986 of a positive response from the company about his dues or reinstatement to his former position of general manager of the company by 25 June 1986. Therefore on the date he considered himself to be dismissed he was not a director. This would take him out of the *Inchcape* case.

He went on to say:

> But the date the workman considers himself to be 'dismissed' cannot be taken as the correct date of 'dismissal'. That date has to be determined by the Industrial Court on facts and evidence produced before it. Therefore, the learned Chairman's conclusion by accepting the claimant's allegation that '25 June 1986' was the material date of dismissal without considering the facts disclosed in the letters of both parties and the minutes of the meeting on 30 May 1986, has been made because he (the Chairman) had asked himself and answered the wrong question. It must be noted that s. 20(1) of the Act merely gives the right to a workman to make representation to the Minister where a workman considers that he has been dismissed without just cause or excuse. That section does not confer on the workman the power to determine his date of dismissal.

At p. 15 of his judgment the learned Judge stated:

> The learned Chairman of Industrial Court has only considered the claimant's letter dated 19 June 1986 which in fact was written after the whole resignation/termination of employment exercise had been completed on 30 May 1986; and on 30 May 1986 the claimant was both an active director and a general manager of the company. As director of the company, he was part and parcel of the mind and will of the company, and he therefore cannot be a 'workman' - *Inchcape Malaysia Holdings Bhd. v. R.B. Gray and Anor.* [1985] CLJ (Rep) 132.

He therefore held that the ruling by the Industrial Court that the claimant was dismissed on 25 June 1986 was clearly perverse and so devoid of plausible justification that no ordinary body of persons could have reached it.

It must be remembered that the question whether the claimant was dismissed on 30 May 1986 or 25 June 1986 has yet to be decided by the Industrial Court. So also the question whether the claimant had resigned voluntarily on 30 May 1986 has yet to be decided by the Industrial Court.

In *Enesty Sdn. Bhd. v. Transport Workers Union & Anor.* [1986] 1 MLJ 18 at 21 Mohamed Azmi SCJ, in delivering the judgment of this Court, made the following observations at p. 21:

> Under the Industrial Relations Act 1967, a dispute on jurisdiction can occur at two stages in proceedings before the Industrial Court. The first is at the initial stage affecting the hearing of the reference or complaint itself when reference is made by the Minister under ss. 20(3), 26(1) or when a complaint is made under s. 56(1); and second is at the final stage affecting the award.

In our view the learned Judge did not really distinguish the two stages. The Industrial Court has merely gone into the threshold jurisdiction (i.e., the initial stage) whether the claimant was a workman at the date when he considered himself dismissed. It has as yet to go into the merits.

The learned Judge converted his review jurisdiction on the matter of *certiorari* in a preliminary issue as to whether the claimant was a workman or not as defined by the Industrial Relations Act into an appellate jurisdiction thereby going into the merits of the case.

Even if he can do so we think on the facts he went wrong. He came to the wrong conclusion.

The learned Judge stated at p. 12:

> It must be noted that s. 20(1) of the Act merely gives the right to a workman to make representation to the Minister where a workman considers that he has been dismissed without just cause or excuse. That section does not confer on the workman the power to determine his date of dismissal.

In *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ (Rep) 298 the appellant held the position of personnel and industrial relations manager. In that capacity he had successfully negotiated a collective agreement with the trade union. The trouble started when he took steps to implement the award confirming the collective agreement. He was told that he would be transferred to manage a cinema theatre belonging to the respondent. He did not accept the transfer as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The dispute was referred to the Industrial Court which gave an award in favour of the appellant holding that he was constructively dismissed and awarded him compensation. The respondent company applied for *certiorari* to quash the award and this was granted in the High Court. The learned Judge stated that the constructive dismissal was not within the ambit of s. 20(1) of the Industrial Relations Act and therefore the Industrial Court had no jurisdiction.

In allowing the appeal this Court held that the common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affecting the foundations of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It further held that there can be no doubt that the appellant in this case was lawfully doing his duty as the personnel and industrial relations manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award and implemented it. The reward for lawfully performing his duties was, however, not promotion but a demotion. As he was driven out of his employment this was therefore a dismissal. The respondent failed to show that the dismissal was for a just cause or excuse. Finally, it was held that the Industrial Court in coming to the conclusion that the appellant was dismissed had not misdirected itself and the Court only spoke of constructive dismissal in the context of the contract test. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

The learned Judge's view would seem to be contrary to the decision in *Wong Chee Hon's* case (*supra*). In the instant case the claimant ceased to be a director on the date of dismissal. The learned Judge was wrong to say that the claimant must determine the date of dismissal. The learned Judge did not appreciate the importance of the two stages and did not distinguish between the threshold and the broad jurisdiction. On the other hand, the Industrial Court was very cautious in not stepping over the line in deciding the preliminary issue.

The company said on the constructive dismissal point it was important to look into the documents, that is, the exchange of letters. It was conceded that at the end of the day the question whether there is constructive dismissal or not would be a decision on the merits. It was also conceded that there is a threshold jurisdiction and a broad jurisdiction.

The company submitted that the learned Judge was entitled to go into the date of constructive dismissal even at the threshold jurisdiction as the claimant put the issue to the Court. He cannot now complain if the Court dealt with it. It was contended that the learned Judge was right to say that the date of constructive dismissal was on 30 May 1986.

The company relied on *Inchcape Malaysia Holdings v. R.B. Gray & Anor.* [1985] CLJ (Rep) 132 for the proposition that if the claimant is a director he cannot be a workman. The claimant considered himself dismissed on 25 June 1986. By which date he was no more a director. One cannot ignore his resignation as general manager on 30 May 1986 but at the same time accept his resignation as a director. If he was forced to resign on 30 May 1986 that would

be the date of the purported constructive dismissal. On the other hand the claimant contended that *Inchcape's* case [1985] CLJ (Rep) 132 should be distinguished on the facts and submitted that the finding of the Industrial Court that the claimant was a workman should not be disturbed. The Industrial Court considered the claimant to have ceased to be a director on 30 May 1986 and held that that would take him out of the *Inchcape's* case (*supra*).

The claimant pointed out that the Industrial Court kept to the point but the learned Judge's approach was different. The Industrial Court merely went into the threshold jurisdiction to determine whether the claimant was a workman at the date when he considered himself dismissed.

The facts of each case must be scrutinized carefully to decide whether a person is a workman. At p. 11 of his judgment the learned Judge stated:

> The Chairman of the Industrial Court went on to consider the functions and duties of the claimant as general manager of the company, and concluded that as a general manager, (and no longer a director wef 30 May 1986) the claimant was a 'workman' as defined in the Industrial Relations Act. My finding is that if it is true that on the date the claimant was 'dismissed', he was not also a director of the company, the Industrial Court's award is correct.

Despite this finding the learned Judge felt that the Industrial Court had made an error so he overruled the decision of the Industrial Court by going into the merits of the case.

The learned Judge considered the position of director but did not touch on the position of general manager. The claimant contended that the two posts of general manager and director would seem to be merged as he always signed letters as director/general manager. The learned Judge did not deal with this point.

The issue of whether or not the claimant was or was not dismissed or as to why he considered himself constructively dismissed was not decided on by the Industrial Court. This is very clear from the record of proceedings. Hence the Chairman of the Industrial Court, after hearing the parties, concluded at p. 415, Vol. 2 of the appeal record by stating that:

> I disallow the preliminary objection made on behalf of the company and direct that the reference be fixed for hearing as to the merits of the matter.

We find that there is much force in the appellant's contention that the learned Judge decided on matters which have yet to be decided by the Industrial Court. The learned Judge held that the claimant had not been dismissed on 25 June 1986 or even on 30 May 1986. He further held that the claimant resigned voluntarily on 30 May 1986. In doing so he has departed from the judicial review of the threshold jurisdiction of the Industrial Court into examining the substantive merits of the case (jurisdiction in the broad sense) on the matter of the dismissal claim pending before the Industrial Court. As a result he had inadvertently stepped into the ambit of the broad jurisdiction. On the other hand, the Industrial Court was scrupulously careful of the borderline.

In the light of our decision we do not consider it necessary to deal with the other points raised on the appeal as they will in all probability be fully ventilated again at the reference.

Also found at [1991] 1 CLJ 687